No. 13-1360

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RICHARD G. TATUM, individually and on behalf of a class of all other persons similarly situated,

Plaintiff-Appellant,

v.

RJR PENSION INVESTMENT COMMITTEE; RJR EMPLOYEE BENEFITS COMMITTEE; R.J. REYNOLDS TOBACCO HOLDINGS, INC.; R.J. REYNOLDS TOBACCO COMPANY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN BENEFITS COUNCIL URGING REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The American Benefits Council (the "Council") is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 350 members are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering more than 100 million Americans. The Council frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit plan design or administration.

The businesses represented by the Chamber and the Council sponsor hundreds of thousands of employee benefit plans, both pension and welfare, that are subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), including its fiduciary responsibility provisions. It is vital to the continued operation of these employee benefit plans that the fiduciary responsibility provisions of ERISA continue to be applied as written and as they have been applied for nearly forty years since ERISA was enacted.

The panel majority adopted a mistaken interpretation of the "prudent man" rule under ERISA that threatens the continued creation and maintenance of employee benefit plans. The Chamber and the Council have already filed an *amicus* brief before the panel. The interest of the Chamber and the Council at this stage is to support the petition for rehearing en banc in this exceptionally important case.[1]

INTRODUCTION

The Court should grant rehearing en banc for two reasons. First, the view taken by the panel majority represents a radical reinterpretation of ERISA forty years after the fact, with no intervening change in circumstances and no public

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[1] As required by Rule 29(c)(5), *amici curiae* state that: (a) no party's counsel authored this brief in whole or in part, (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and (c) no person—other than *amici curiae*, their members, or their counsel—contributed money intended to fund preparing or submitting this brief.

rulemaking. Second, the view taken by the panel majority, in addition to being unworkable, will discourage individuals from serving as fiduciaries and dramatically raise the costs of those who do, thus diverting money away from providing benefits to participants.

ARGUMENT

I. THE PANEL'S DECISION IS CONTRARY TO FORTY YEARS OF ERISA LAW.

From its inception in 1974, ERISA has bound a fiduciary to act as "a" prudent man would act—not as a majority of prudent men or a plurality of prudent men. Section 404 of ERISA specifically states that the referent is "a" prudent man:

> [A] fiduciary shall discharge his duties . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that *a prudent man* acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . .

29 U.S.C. § 1104(a)(1)(B) (emphasis added). A fiduciary is blameless under ERISA if his course of action was prudent, regardless of how other prudent men might have acted. A fiduciary falls short of the ERISA standard only if he chooses a course that *no prudent man* would have chosen.

In cases where the fiduciary made inadequate investigation, however, the panel majority held that the referent will no longer be "a" prudent man; it will be a *majority* of prudent men. Specifically, a fiduciary will not be protected unless his decision is the decision that other prudent men "more likely than not" would have

made. (Panel Op. at 35-37). Of course, prudent men "more likely than not" would have made any particular decision only where a majority of them would have made that decision. So, according to the panel majority, the standard of reference is no long "a" prudent man; it is a majority of prudent men.

The rules of fiduciary responsibility under ERISA were borrowed from the common law of trusts. *See*, *e.g.*, *Conkright v. Frommert*, 130 S.Ct. 1640 (2010). Not surprisingly, the common law of trusts expresses the prudent man rule in terms identical to ERISA, binding the fiduciary to act as "a" prudent man would act: "In his management of the trust, the trustee is required to manifest the care, skill, prudence, and diligence of *an ordinarily prudent man* engaged in similar business affairs and with objectives similar to those of the trust in question." G. Bogert and G. Bogert, *The Law of Trusts and Trustees* § 541, p. 167 (2d rev. ed. 1993) (emphasis added). In explicating fiduciary responsibility, *Bogert* never states, suggests or hints that the standard for reference is a majority or a plurality or any other cohort of prudent men, only "an" ordinarily prudent man.[2]

The U. S. Department of Labor (the "DOL") is the agency charged with interpreting and applying the fiduciary rules of ERISA. In the forty years since

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[2] The phrase "an ordinarily prudent man" refers, not to degrees of prudence, but to the prudence of an ordinary man as opposed to an expert: "It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are." *Ibid*. (quoting Lord Blackburn from *Speight v. Gaunt*, 1883, 9 A.C. 1, 19, 20).

ERISA became law, however, the DOL has never promulgated a rule imposing liability on a fiduciary where a prudent man would have made the same decision, although a majority of prudent men would not. Prudence is mentioned in seventeen regulations issued by DOL under ERISA, but none of them embraces (or even acknowledges the possibility of) any such concept as fiduciary liability for choosing an admittedly prudent option merely because a majority of fiduciaries would have chosen a different prudent option.[3]

Hence, neither the statute nor the common law of trusts calls for the novel approach announced by the panel majority—and the DOL has never seen fit to propose it in any rulemaking process. The panel majority's decision erroneously replaces the standard of reference adopted by Congress—"a" prudent man—with its unworkable "a majority" of prudent men test, at least in cases of inadequate investigation.

II. THE PANEL'S DECISION WILL DISCOURAGE INDIVIDUALS FROM SERVING AS FIDUCIARIES AND INCREASE PLAN COSTS.

Unfortunately, the consequences of this new gloss on the fiduciary rules of ERISA will not be visited only on the hopefully small number of fiduciaries who fail to make adequate investigation. In daily life, no fiduciary can know in advance whether the extent of his investigation will challenged and, if so, whether

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[3] If DOL were to propose any such rule, it should be proposed through formal rulemaking, with opportunity for public comment, not through an amicus brief.

the extent of his investigation will be found to have been inadequate. It will therefore be imperative for *every* fiduciary, with *every* fiduciary decision that they make, to assure (as best they can) that their decision is the decision that a majority of prudent men would have made, because "more likely than not" is their only protection against liability if charged with and found guilty of inadequate investigation. Moreover, every participant who challenges a fiduciary decision will henceforth include a separate count of failure to make adequate investigation—so that, even if the fiduciary's decision is found to have been prudent, the participant can still recover monetary damages if the investigation was inadequate and the decision is not the decision that a majority of prudent men would have made. The allegation of failure to make adequate investigation will require discovery, preventing resolution at the pleadings stage.

How a fiduciary is supposed to secure that assurance is left unanswered in the panel decision. It might be impossible in many cases, such as where there are three or more prudent options no one of which would likely be the choice of a majority of prudent men.[4] Suppose the question is whether to replace the current

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[4] In the classic "buy, sell or hold" decision, for example, it may very well be that one third of prudent men would buy, one third would sell and one third would hold. Since no one of those choices would command a majority of prudent men, *none* of those fiduciaries would be protected against personal liability, in the case of inadequate investigation, according to the new interpretation of the panel majority. By contrast, the plain language of ERISA Section 404 protects all of

investment manager with a new investment manager. Given that institutional investment managers are hired and fired all the time, how is the fiduciary to know what a majority of prudent men would do? Suppose the question is whether to buy, hold or sell a particular stock. In the flurry of activity on the stock market, where some are buying and others are selling all day long, how is a fiduciary to know what a majority of prudent men would do with that stock on any given day? For that matter, when looking at what other fiduciaries are doing, how does the fiduciary even know which of them are acting as prudent men and which are not?

And the problem goes well beyond the investment of plan assets of pension and 401(k) plans. There are many types of fiduciary decisions in the day-to-day administration of an employee benefit plan. Should a medical plan use a particular firm to process claims or a different firm? Should participants be informed of a proposed change in the plan now or can it wait until the next open enrollment? Has a particular participant demonstrated total and permanent incapacity sufficient to be entitled to long-term disability benefits or not? In all of those myriad fiduciary decisions, in welfare benefit plans as well as retirement plans, how is a plan administrator to know what a majority of prudent men would do in the same situation?

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them, because all three choices are choices that "a" prudent man would have made, even if no choice would command a majority.

Far from being rare, therefore, this conundrum of what decision would "more likely than not" be made by prudent men will face fiduciaries every day, with every decision they make. No individual will be willing to take that risk, so fiduciaries (if they can be found at all) will insist on either insurance or indemnification—an expense that will ultimately be borne by the participants. If the fiduciary is insured, the employer will pay for the insurance and the high cost will surely lead to an offsetting reduction in contributions to the plan. If the fiduciary is indemnified by the employer, any payment of indemnification likely will cause the employer to reduce its contributions to the plan to recoup the expense. And if the fiduciary purchases advice from a fiduciary advisory company that agrees to assume the liability, the cost will once again be visited on the participants in the plan either as a direct cost of plan administration or as the employer reimburses the fiduciary and then reduces its contributions to the plan to offset that cost.

CONCLUSION

The Court should grant the petition for rehearing en banc.

Respectfully submitted,

/s/ Hollis T. Hurd

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE
REQUIREMENTS, AND TYPE-STYLE REQUIREMENT

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(iii) because this brief contains 2,241 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in Times New Roman 14-point font.

This the 25th day of August, 2014.

/s/ Hollis T. Hurd

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2014, I electronically filed the foregoing **BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN BENEFITS COUNCIL URGING REHEARING EN BANC** with the Clerk of Court using the CM/ECF System. Counsel for all parties are registered CM/ECF users and will be served with the foregoing document by the Court's CM/ECF System.

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